

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT PIPER)	
Claimant)	
VS.)	
)	Docket No. 210,674
A-1 REFUSE)	
Respondent)	
AND)	
)	
FARM BUREAU MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed Administrative Law Judge Bruce E. Moore's preliminary hearing Order dated February 16, 1998.

ISSUES

Preliminary hearings were held in this case on July 9, 1997, and January 20, 1998. The preliminary hearing record consists of 13 separate deposition transcripts that include 51 exhibits.

The Administrative Law Judge in the August 29, 1997, preliminary hearing Order denied claimant's request for medical treatment for a severe injury to his left hand and alleged residual left arm, shoulder, back, and psychological injuries. The Administrative Law Judge found there was not an employee and employer relationship between the claimant and the respondent for coverage under the workers compensation act. Furthermore, the Administrative Law Judge found that the Farm Bureau Mutual Insurance Company (Farm Bureau) workers compensation policy, in effect on the date of claimant's accident, did not provide workers compensation coverage for claimant.

The claimant appealed the August 29, 1997, Order to the Appeals Board for review. In an Order dated December 31, 1997, the Appeals Board remanded the case to the Administrative Law Judge for a hearing and determination on the question of whether the corporate status of respondent had changed and, if so, for a further order by the Administrative Law Judge to establish whether any such change of circumstances would alter his opinion on the remaining issues.

After the Appeals Board's remand, the Administrative Law Judge found that respondent's corporate status had changed, but this did not change his decision as contained in the August 29, 1997, preliminary hearing Order. In the February 16, 1998, preliminary hearing Order, that is the subject of this appeal, the Administrative Law Judge again found claimant failed to prove an employee and employer relationship for coverage under the workers compensation act. Furthermore, the Administrative Law Judge again found that claimant was not covered by Farm Bureau's workers compensation insurance policy in effect on the date of claimant's accident.

Claimant contends he was an employee of the respondent corporation on the date of his accident of October 11, 1994. Claimant also argues, since there was an employee and employer relationship, then claimant was an employee covered under Farm Bureau's workers compensation policy, and he is entitled to workers compensation benefits for his work-related injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Findings of Fact

- (1) Claimant was working as a trash pickup man on October 11, 1994, when he suffered a severe crush injury to his left hand.
- (2) The accident resulted in a tendon and nerve injury, multiple fractures, and a ray amputation to his left thumb. The medical records entered into evidence at the preliminary hearing also indicate that claimant is suffering from psychological problems as a result of his severe physical injury.
- (3) On the date of claimant's accident, respondent had in force a workers compensation insurance policy covering employees of the respondent issued by Farm Bureau.
- (4) No workers compensation benefits have been provided claimant as Farm Bureau contends claimant was excluded from coverage under the policy.

(5) On May 6, 1993, claimant and his wife purchased the assets of an operating trash service company with the down payment cash provided by the claimant and his wife and the other proceeds from a Small Business Association loan.

(6) The purchased assets were conveyed by bill of sale to both claimant and his wife.

(7) Claimant and his wife were advised to incorporate their trash hauling business because claimant had previously filed for bankruptcy.

(8) The respondent corporation, A-1 Refuse Service, Inc., filed its Articles of Incorporation with the Secretary of State office on May 19, 1993. However, the articles were not filed with the Saline County Register of Deeds Office until January 8, 1998.

(9) Claimant's wife was the incorporator, president, member of the Board of Directors, and sole stockholder of the corporation.

(10) Claimant was the secretary/treasurer of the corporation and member of the Board of Directors.

(11) The only corporate records contained in the record are the minutes of one Board of Directors' meeting held on April 1, 1993, before the Articles of Incorporation were filed with the Secretary of State on May 19, 1993, and a filled-in form of a Resolution of the Board of Directors signed by claimant and his wife as president and secretary treasurer of the corporation on May 19, 1993. The Board of Directors' meeting authorized the corporation to apply for the Small Business Association loan in order to purchase assets of the trash service company, and the resolution authorized the officers of the corporation to execute documents necessary to obtain the SBA \$63,700 loan.

(12) The corporate assets purchased by the claimant and his wife on May 6, 1993, were never transferred to the corporation.

(13) The respondent corporation failed to file its 1993 annual report and pay the franchise tax. Therefore, the Secretary of State, on July 15, 1994, forfeited the corporation.

(14) On August 20, 1997, a Certificate of Reinstatement for the corporation was filed in the Secretary of State's office and on August 21, 1997, a certified copy of the certificate was also filed in the Saline County Register of Deeds Office.

(15) On July 28, 1993, claimant signed a form K-WC 50 form stating he was an employee of A-1 Refuse Service, Inc., and he owned 10 percent or more of the corporate stock and elected, pursuant to K.S.A. 44-543, not to accept coverage under the Kansas Workers Compensation Act. The form was filed of record with the Division of Workers Compensation.

(16) An Employer Report of Accident for claimant's October 11, 1994, accident was completed on November 17, 1994.

(17) Claimant served the respondent with a claim for compensation on May 17, 1995.

(18) An application for hearing was filed by the claimant with the Division of Workers Compensation on March 11, 1996.

(19) The Appeals Board also adopts the Administrative Law Judge's findings and conclusions as set forth in the preliminary hearing Orders dated August 29, 1997, and February 16, 1998, that are not inconsistent with the findings contained in this Order.

Conclusions of Law

(1) The Appeals Board only has jurisdiction to review disputed preliminary hearing issues listed in K.S.A. 1997 Supp. 44-534a(2) or when it is alleged the Administrative Law Judge exceeded his or her jurisdiction as provided by K.S.A. 1997 Supp. 44-551(b)(2)(a).

(2) The issue of whether claimant and respondent had an employee and employer relationship is directly related to the issue of whether claimant's accidental injury arose out of and in the course of his employment with the respondent. Therefore, the Appeals Board has jurisdiction to review this issue. See K.S.A. 1997 Supp. 44-534a.

(3) However, the Appeals Board concludes the issue of whether claimant was covered by the workers compensation insurance policy issued by Farm Bureau is not a jurisdictional issue that the Appeals Board, at this juncture of the proceeding, has jurisdiction to review. See K.S.A. 1997 Supp. 44-534a.

(4) The Appeals Board concludes the filing of a certified copy of the Articles of Incorporation with the Saline County Register of Deeds Office on January 8, 1998, revived the respondent corporation's existence and related back to the date the Articles of Incorporation were filed with the Secretary of State on May 19, 1993. See River City Broadcasting, Inc. v. Systems with Reliability, Inc., 262 Kan. 680, 941 P.2d 937 (1997).

(5) The Appeals Board concludes that the filing of the Certificate of Reinstatement with the Secretary of State on August 20, 1997, and a certified copy of the Certificate of Reinstatement with the Saline County Register of Deeds on August 21, 1997, reinstated the corporate status of respondent corporation retroactively to July 15, 1994, the date the corporation's articles were forfeited. See K.S.A. 17-7002; Mission Road Associates, L.P. by United Properties, Inc. v. IML Realty Co., 15 Kan.App.2d 388, Syl. ¶ 1, 807 P.2d 1330 (1991).

(6) The Appeals Board concludes, although the respondent corporation may have had a technical corporate status under the corporation laws of the State of Kansas, the facts,

as set forth above, establish that claimant and his wife were simply individuals using the corporation as an instrumentality, or as a sham, to conduct personal business. The Appeals Board concludes the corporate entity should be disregarded as claimant and his wife were operating their business as a partnership.

This conclusion is supported by the following facts: (1) The funds used to purchase the business were either mutually provided or provided to the claimant and his wife from a mutual loan; (2) The assets of the business purchased by claimant and his wife and were never transferred to the corporate entity; (3) Claimant and his wife were the only officers and the only members of the Board of Directors; (4) The claimant's wife was the sole stockholder; (5) Claimant and his wife never were concerned about the corporation's legal status under the Kansas corporation law until after claimant's injury; and (6) There was no evidence of observation of corporate formalities except for one Board of Directors meeting and one resolution of the Board of Directors.

Similar factors were considered when the corporate entity was disregarded and individual liability was imposed on the sole stockholder, director, officer, and financial contributor of the corporation in the case of Sampson v. Hunt, 233 Kan. 572, 665 P.2d 743 (1993).

(7) In the case of Roark v. Roark Motor Co., 196 Kan. 741, 743, 413 P.2d 1019 (1966), the Kansas Supreme Court denied claimant's widow death benefits under the workers compensation act. The claimant was the sole owner of all the stock in the corporation. He was the president, member of the Board of Directors, and exercised complete control over all phases of the corporation business. The Court held that claimant was not an employee of the respondent corporation. The Court reasoned that employment anticipates an understanding or agreement between two parties and a person cannot contract with himself.

(8) The Appeals Board, therefore, concludes that the respondent corporation, for purposes of the workers compensation act, was not the employer of the claimant on the date of claimant's accident.

(9) The Appeals Board further concludes the claimant and his wife, on the date of claimant's accident, were operating as a partnership and not as a corporation. An individual partner in a partnership is not considered an employee under the K.S.A. 44-508(b) unless an election has been filed pursuant to K.S.A. 44-542a.

(10) The Appeals Board concludes the record does not contain any evidence that an election was filed by the claimant pursuant to K.S.A. 44-542a.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bruce E. Moore's February 16, 1998, preliminary hearing Order should be, and is hereby, affirmed in regard to the finding that claimant and respondent did

not have an employee and employer relationship for coverage under the workers compensation act.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

c: Gregory G. Lower, Wichita, KS
John D. Conderman, Manhattan, KS
Dan M. McCulley, Junction City, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director